

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

Revision of Part 22 of the )  
Commission's Rules Governing )  
the Public Mobile Services )

CC Docket No. 92-115

DOCKET FILE COPY ORIGINAL

PARTIAL OPPOSITION TO PETITION FOR  
RECONSIDERATION OF MCCAW CELLULAR COMMUNICATIONS, INC.

C-Two-Plus Technology, Inc. ("C2+"), hereby opposes in part the petition for reconsideration filed by McCaw Cellular Communications, Inc. ("McCaw"). The "clarification" of Section 22.901 sought by McCaw is unnecessary and would give McCaw and other cellular carriers unfettered discretion to terminate service to cellular customers for anticompetitive purposes.

Section 22.901 of the rules, as described by the Commission, does not impose any new service obligations on the cellular carriers, but merely consolidates certain obligations previously contained in several different rule provisions:

This Section consolidates rules that require cellular licensees to provide service to subscribers in good standing, including roamers (old §22.911), other rules related to service provided by cellular carriers (old §22.914 and 22.912(c)), and provisions for alternative cellular technologies and auxiliary service (old §22.930).

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Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, \_\_\_ FCC Rcd. \_\_\_, 76 RR2d 1 (1994) ("Report and Order"), Appendix A at A-39. The new rule states that a cellular licensee must provide service "upon request to all cellular subscribers in good standing, including roamers," but may refuse or terminate service, subject to any applicable notice requirements, to any subscriber who: (a) "operates a cellular telephone in an airborne aircraft in violation of §22.925;" or (b) "otherwise fails to cooperate with the licensee in exercising operational control over mobile stations pursuant to §22.927." 47 C.F.R. §22.901.

McCaw now requests the Commission to "clarify" that the rule does not limit "the types of circumstances under which a carrier may terminate service to a subscriber to the two rationales set out at the end of the section." McCaw Petition at 42. Instead, McCaw asks the Commission to determine in the abstract that "there are a number of other valid, legitimate reasons for a cellular operator to terminate service, including: suspected fraud by the subscriber; failure to abide by the terms and conditions of the subscriber agreement; failure to pay for service; and use of an emulated phone, among others." Id. (emphasis added). C2+ respectfully suggests that the requested "clarification" is neither necessary nor appropriate.

McCaw provides no support for its requested "clarification" and no guidelines as to how it would determine the existence of any of the purportedly "valid reasons" for terminating service which it has identified. For example, McCaw seeks the right to terminate a customer for "suspected fraud," but does not delineate what level of "suspicion" is sufficient to justify termination. Likewise, it seeks the right to terminate service for "failure to pay," without specifying how long a bill must be overdue before termination is justified. McCaw also would have the Commission approve in advance any termination for "failure to abide by the terms and conditions of the subscriber agreement" -- without knowing the particular terms or conditions that were violated to justify termination.

Most significantly, McCaw also seeks absolute authority to terminate a customer for "use of an emulated phone." McCaw Petition at 42. C2+ supports a carrier's right to terminate service immediately to any person using a phone with a modified or emulated electronic serial number ("ESN") to obtain cellular service fraudulently (i.e. to make calls which either cannot be billed by the carrier or are billed to a cellular customer without that customer's permission). However, C2+ opposes any "clarification" of Section 22.901 which would give the carrier unfettered discretion to terminate a bona fide subscriber in good standing for using a phone which emulates the ESN of his primary phone to place or receive

calls which are billed to and paid for by the subscriber with his or her full knowledge and consent.

First, there is substantial record evidence that ESN modification and/or emulation has been a significant aspect of "established cellular telephone repair and upgrade practices" for years. See e.g. Petition for Clarification and Reconsideration of the Mobile and Personal Communications 800 Section of the Telecommunications Industry Association filed Dec. 19, 1994, at 6, 9 ("ESN transfers were crucial to manufacturers' repair and service upgrade procedures"); Petition for Reconsideration of the Ericsson Corporation filed Dec. 19, 1994, at 4 n.4 ("Repair/replacement programs and the technology to make quick and easy ESN and other electronic changes to cellular terminals have been developed at the insistence of cellular carriers who do not want their subscribers to be inconvenienced in any manner by defective terminals"); Reply Comments of Motorola, Inc., filed Nov. 5, 1992, at 2-3 (Motorola has an ESN transfer repair "program in place, and it has been positively accepted by a number of cellular service providers,...the cellular user public," and the Cellular Telecommunications Industry Association ("CTIA"), whose "equipment certification program currently...permits these ESN transfer procedures"); CTIA Comments filed Oct. 5, 1992, at 8 (absolute prohibition on ESN modification outside the factory would interfere with "legitimate repairs"); C2+ Petition for Recon-

sideration filed Dec. 19, 1994, at 6 (C2+ has provided "responsible ESN modification" as a repair service "to certain cellular customers whose primary phones have malfunctioned"). Thus, there are countless cellular subscribers who are currently using phones whose ESNs have been modified through repair practices which were "developed at the insistence of cellular carriers" and which have been generally accepted by the industry for years. These phones are not being used fraudulently and there is no justifiable reason to permit cellular carriers at their whim to terminate service to customers in retaliation for using such phones.

Second, McCaw has offered no justification for terminating service to a paying customer in good standing simply because that customer elects to make "use of an emulated phone" as an "extension" phone to place or receive calls which are billed to the customer's primary phone and for which he or she pays all applicable charges. McCaw's interest in securing the Commission's approval to terminate such customers is not motivated by its desire to protect against fraud or to clarify its service obligations, but rather by its desire to protect its monthly recurring revenue stream.

There is substantial consumer demand for "two phones/one number" service or other similar cellular "extension phone" services. Based on the projected demand for such services, one petitioner has calculated that providing "exten-

sion" service through responsible ESN modification or emulation techniques would save cellular subscribers over \$4 billion in monthly recurring charges over the next five years when compared to similar services now offered by the carriers (which combine two ESNs onto a single mobile identification number through software at the switch -- a service for which the carriers charge \$20 to \$40 per month in addition to the air-time charges for both phones). See Petition for Reconsideration of MTC Communications, filed Dec. 19, 1994, at 11. Thus, cellular carriers clearly have an overwhelming financial incentive to prevent subscribers from taking advantage of "extension" service through "use of an emulated phone" rather than through their own "two phones/one number" service offerings. Allowing the carriers to terminate bona fide customers in retaliation for using emulated phones under these circumstances contributes nothing to the prevention of cellular fraud and serves only to enhance the revenue stream of the duopoly cellular carriers and to further insulate them from competition.

#### CONCLUSION

The "clarification" of Section 22.901 sought by McCaw is neither necessary nor appropriate. The new rule imposes no new obligations upon the cellular carrier and the requested "clarification" would allow carriers unfettered

discretion to terminate customers for anticompetitive purposes. Consequently, McCaw's request for clarification of Section 22.901 should be denied.

January 20, 1995

Respectfully submitted,

A handwritten signature in cursive script, reading "Timothy J. Fitzgibbon", written over a horizontal line.

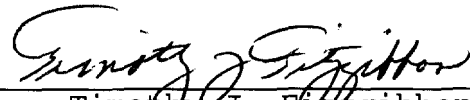
Timothy J. Fitzgibbon  
Thomas F. Bardo  
Carter, Ledyard & Milburn  
1350 I Street, N.W., Suite 870  
Washington, D.C. 20005

Attorneys for  
C-Two-Plus Technology, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing  
"Partial Opposition to Petition for Reconsideration of McCaw  
Cellular Communications, Inc" was served this 20th day of  
January, 1995 by first-class mail, postage prepaid, upon the  
following:

McCaw Cellular Communications, Inc.  
c/o Cathleen A. Massey  
Regulatory Counsel  
1150 Connecticut Avenue, N.W.  
4th Floor  
Washington, D.C. 20036

  
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Timothy J. Fitzgibbon